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No. 05-1411

IN THE
Supreme Court of the United States

FREDERICK JAMES MOORE,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Petition for a Writ of Certiorari
To The Maryland Court of Appeals

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with a membership of more than 11,200 attorneys and 28,000 affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practices, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

This case raises important questions concerning an indigent criminal defendant's right to a DNA expert. NACDL offers its practical view of why defendants incriminated by DNA evidence need their own experts, and then addresses the important question whether indigent defendants may be forced to choose between their right to an expert and their right to counsel of their choice.

SUMMARY OF ARGUMENT

DNA evidence is used with increasing frequency in criminal prosecutions and is typically accorded heavy evidentiary weight. But DNA testing is not infallible. Test samples may be mislabeled or contaminated, and test results may be skewed or misinterpreted by human error. To mount a meaningful defense when incriminated by DNA evidence, criminal defendants must have an independent expert who can

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[1] No counsel for any party had any role in authoring this brief, and no one other than the *amicus curiae* and its counsel made any monetary contribution to its preparation or submission. The parties have consented to the filing of this brief in letters of consent on file with the Clerk.

retest the DNA evidence, review the prosecution's test data for errors, aid defense counsel in cross examination, and testify as to the uncertainty in DNA testing. For these reasons, expanded on below, the Maryland Court of Appeals correctly assumed that the due process right articulated in *Ake* v. *Oklahoma*, 470 U.S. 68 (1985), requires that states provide necessary DNA experts to indigent criminal defendants.

The Maryland court erred, however, in holding that only indigent criminal defendants who are represented by the State's Public Defender's Office may obtain necessary State-appointed experts. That ruling impermissibly forces an indigent defendant to choose between his Sixth Amendment right to counsel and his due process right to present an adequate defense. See *Simmons* v. *United States*, 390 U.S. 377, 394 (1968). It also violates the Equal Protection Clause, because it impinges on the fundamental right to counsel without serving any compelling government interest. See *Ill. Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 185 (1979).

The population of indigent defendants who for one reason or another secure representation by private counsel is not small. The constitutional issue presented by this case is thus recurring as well as important, and warrants this Court's review.

ARGUMENT

We show in Part I below that DNA evidence is subject to human error and that, without an independent DNA expert, criminal defendants may be convicted by faulty DNA test results. In Part II, we show that Maryland improperly requires indigent criminal defendants to choose between their due process right to a DNA expert and their Sixth Amendment right to retain counsel of their choice.

I.

Criminal Defendants Need an Independent Expert To Mount a Meaningful Defense to DNA Evidence.

When DNA evidence first entered courtrooms in the late 1980s, it was heralded as "the single greatest advance in the 'search for truth,' and the goal of convicting the guilty and acquitting the innocent, since the advent of cross-examination." *People* v. *Wesley*, 533 N.Y.S.2d 643, 644 (Albany County Ct. 1988). Courts proclaimed that its reliability "justifie[d] an aura of amazement," *United States* v. *Jakobetz*, 747 F. Supp. 250, 263 (D. Vt. 1990), and experts argued that a false match — a test result that incriminated an innocent defendant — was impossible.[2]

Not surprisingly, the use of DNA evidence in criminal trials has increased dramatically in the past two decades. In 1996, about half of all state prosecutor's offices used DNA evidence in felony trials or plea negotiations; by 2001, two-thirds did.[3] DNA evidence has been admitted in almost every jurisdiction, Moriarty § 11:45, and has gained such standing in the criminal justice system that DNA evidence alone may convict or exonerate a defendant.[4]

A. DNA Testing Is Subject to Human Error.

Despite the early claims made for it, DNA testing is not infallible. With growing use in the criminal justice system

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[2] Jane Campbell Moriarty, Psychological and Scientific Evidence in Criminal Trials § 11:38 n.3 (2003) [hereinafter Moriarty].

[3] Carol J. DeFrances, Bureau of Justice Statistics, Prosecutors in State Courts, 2001, at 1 (2002) [hereinafter DeFrances].

[4] See, *e.g.*, *Roberson* v. *State*, 16 S.W.3d 156, 170 (Tex. App. 2000); The Innocence Project, *Causes and Remedies of Wrongful Convictions*, http://www.innocenceproject.org/causes/index.php (last visited May 2, 2006).

has come growing evidence of its limits. DNA evidence has been called into question or proven faulty in numerous cases around the country, and in fact false matches and flawed DNA test results have resulted in the conviction of innocent individuals.[5] Understanding how this can happen requires a brief description of the DNA testing process.

1. DNA Testing Primer

Each human sex cell, a sperm or an ovum, contains twenty-three chromosomes.[6] When a sperm and ovum combine into a fertilized cell, that cell contains forty-six chromosomes, matched up into twenty-three pairs — the number one chromosome from the father pairs with the number one chromosome from the mother, and so on. The chromosomes are replicated as the fertilized cell divides, until almost every cell in a human's body contains copies of the twenty-three pairs. The chromosomes contain all of the genetic information that makes us human and individual.

Each chromosome is made up of a DNA (deoxyribonucleic acid) molecule. Long and double-stranded, DNA molecules

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[5] See, *e.g.*, William C. Thompson et al., *How the Probability of a False Positive Affects the Value of DNA Evidence*, 48 J. Forensic Sci. 1, 2–3 (2003); William C. Thompson, *Tarnish on the 'Gold Standard': Understanding Recent Problems in Forensic DNA Testing*, 30 Champion 10, 10–12 (2006) [hereinafter Thompson, *Gold Standard*]; Adam Liptak, *You Think DNA Evidence Is Foolproof? Try Again*, N.Y. Times, Mar. 16, 2003, § 4, at 5 [hereinafter Liptak]. For sources documenting errors in DNA testing, see *DNA Testing Problems*, Scientific Testimony, http://www.scientific.org/DNAProblems/DNA-Problems.htm (last visited May 11, 2006).

[6] Unless otherwise indicated, all of the information provided in the next two paragraphs comes from David H. Kaye & George F. Sensabaugh, Jr., *Reference Guide on DNA Evidence*, *in* Federal Judicial Center, Reference Manual on Scientific Evidence 491–93, 560 app. pt. A (2d ed. 2000), *available at* http://www.fjc.gov/public/home.nsf/pages/16 [hereinafter Federal Judicial Center].

are shaped like twisted ladders or double helixes. Along the length of each DNA strand, four organic building-block substances, called "bases" and abbreviated as A, T, G, and C, combine in pairs. The order in which the base pairs occur along the length of a DNA molecule dictates the genetic makeup of each individual.

The order of base pairs is identical in over 99% of the DNA in every human. That is, over 99% of the genetic makeup of every human is identical. But scientists have identified specific locations on DNA strands where the order of base pairs can differ, leading to different and distinctive genetic makeups. For instance, at a certain location on the DNA found in the fifteenth chromosome, base pairs may be ordered in a number of different ways, which may account for differences in eye color. The particular ordering of base pairs at a particular DNA location is called an allele (rhymes with Camille). Because each individual has two fifteenth chromosomes, one from each parent, there are two alleles at that location. An individual with allele A on the DNA from his maternal fifteenth chromosome and allele B on the DNA from his paternal fifteenth chromosome may have blue eyes, while someone with alleles C and D may have brown eyes.

DNA tests compare the specific locations on DNA strands where base pairs can differ between individuals. If DNA samples do not have the same two alleles at each tested location, they could not have come from the same source. If the samples do have the same alleles at each tested location, the samples are a match — meaning that it is possible they came from the same source. Moriarty §§ 11:4, 11:6. Because a DNA test compares only certain locations on two individuals' DNA strands, it cannot determine conclusively

that the two samples came from the same source, only that it is *possible* that they did.[7]

The most common form of DNA testing is called the short tandem repeat, or STR, test. *Id.* § 11:22.[8] It can be performed using only trace amounts of DNA, which are then amplified, or replicated, using a method called polymerase chain reaction or PCR. *Id.* § 11:6. The FBI has identified as appropriate for STR testing thirteen of the specific locations on DNA strands where base pairs can differ between individuals. *Id.* Commercial kits amplify traces from those locations using PCR.[9] As the kits amplify the DNA, they label the specific locations on the DNA to be tested with colored dyes. An automated test process then "reads" the DNA and generates graphs that show the alleles at each tested location. *Id.* § 11:25. An analyst compares the graphs to determine whether the samples have the same alleles.

If the samples are a match, the DNA analyst, using databases containing the genetic profiles of many individuals, prepares a "frequency estimate" — in lay terms, an assessment of the probability that a match is the product of random chance. *Id.* §§ 11:35, 11:36. By counting the number of times alleles occur at a particular location, and controlling for racial differences, the analyst can determine the probability that two random individuals from the same racial group would have the same alleles at all matching locations. The analyst may come up with a frequency estimate that only

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[7] Jonathan J. Koehler, *DNA Matches and Statistics: Important Questions, Surprising Answers*, 76 Judicature 222, 224 (1993).

[8] The STR test was used by the prosecution's expert in this case. Record at T4-60–61.

[9] The prosecution's expert in this case used the ProfilerPlus kit, which tests nine of the thirteen locations. Record at T4-60–62.

one individual in millions or billions would randomly match in the same way. See *id.* § 11:36.

Every DNA test includes procedural controls that are supposed to guard against faulty results due to contamination. Contamination occurs when an alternate source of DNA is added to the original sample and can result in a false match because the test will reveal alleles other than those originally present. See Federal Judicial Center, at 514–15. Even when such controls are effective, however, they cannot catch errors such as the mislabeling of samples. Mislabeling occurs when a DNA sample is wrongly identified and may result in a false match because the test literally tests another person's DNA. *See id.* at 512.

2. The Potential for and Occurrence of Error

Errors resulting from mislabeled or contaminated DNA samples "appear to be chronic and occur even at the best DNA labs." Thompson, *Gold Standard*, at 11. Documented instances have occurred in California, Maryland, Minnesota, Nevada, North Carolina, Pennsylvania, Texas, and Washington.[10] One Washington State laboratory "contaminated tests or made other mistakes while handling DNA evidence in at least 23 cases involving major crimes over the last three years."[11] And files from the Orchid-

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[10] See, *e.g.*, Thompson, *Gold Standard*, at 10–11; Ruth Teichroeb, *Rare Look Inside State Crime Labs Reveals Recurring Problems 23 Cases in 3 Years Had DNA Test Errors*, Seattle Post-Intelligencer, July 22, 2004, at A1 [hereinafter Teichroeb]; Phoebe Zerwick, *DNA Mislabeled in Murder Case*, Winston-Salem J., Aug. 28, 2005; Pheobe Zerwick, *Mixed Results: Forensics, Right or Wrong, Often Impresses Jurors*, Winston-Salem J., Aug. 29, 2005.

[11] "Forensic scientists tainted tests with their own DNA in eight of the 23 cases. They made mistakes in six others, from throwing out evidence swabs to misreading results, fingering the wrong rape suspect." Teichroeb, at A1.

Cellmark laboratory in Germantown, Maryland, which performed the DNA testing in the case at bar, "show dozens of instances in which samples were contaminated with foreign DNA or DNA was somehow transferred from one sample to another during testing." Thompson, *Gold Standard*, at 11.

Many such errors are traced to DNA laboratories that are overworked and undersupervised.[12] Labs often have caseloads that vastly exceed their capabilities, leading analysts to rush test results.[13] Many DNA labs are not subject to regulation or mandatory accreditation requirements,[14] and in 2004 the *Chicago Tribune* reported that "evidence of problems ranging from negligence to outright deception has been uncovered at crime labs in at least 17 states."[15]

Perhaps the most notorious DNA lab was the Houston Police Department's. An outside investigator found "pervasive problems" in 40% of the reviewed tests, including failures to report exculpatory evidence, misleading reports of the statistical significance of DNA profiling results, and the absence of proper controls.[16] Dozens of DNA retests failed to

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[12] J. Herbie DiFonzo, *The Crimes of Crime Labs*, 34 Hofstra L. Rev. 1, 2–4 (2005) [hereinafter DiFonzo]; Thompson, *Gold Standard*, at 12.

[13] See Greg W. Steadman, Bureau of Justice Statistics, Survey of DNA Crime Laboratories, 2001, at 2 (2002). "Some labs have become high-tech sweatshops * * *." Thompson, *Gold Standard*, at 12.

[14] DiFonzo, at 3–4. As of May of 2006, only 313 crime laboratories, out of more than 1,000 nationwide, have been accredited with the American Society of Crime Laboratory Directors. Am. Soc'y of Crime Lab. Dirs., Lab. Accreditation Bd., Laboratories Accredited by ASCLD/LAB, http://www.ascld-lab.org/legacy/aslablegacylaboratories.html (last visited May 30, 2006).

[15] Maurice Possley et al., *Scandal Touches Even Elite Labs: Flawed Work, Resistance to Scrutiny Seen Across U.S.*, Chi. Trib., Oct. 21, 2004.

[16] Michael R. Bromwich, Independent Investigator, Fourth Report of the Independent Investigator for the Houston Police Department Crime

(*continued next page*)

confirm the tests of the Houston lab, and later testing proved the innocence of two men "falsely incriminated by botched lab work." Thompson, *Gold Standard*, at 10.

Even in the best-run lab under the best of conditions, a test of an uncontaminated, properly labeled DNA sample may result in a false positive, for DNA analysts have substantial leeway to make subjective judgments during the testing process.[17] An analyst testing a sample with DNA from more than one contributor must make judgments about which alleles are from a primary contributor, whether any contributors share alleles, and whether unexpected alleles are from an alternate contributor or other sources.[18] Moriarty §§ 11:6, 11:26. The analyst may create a false profile based on a combination of alleles from two contributors, or exclude the actual perpetrator from the test result. *Id.* § 11:26. A test may show fewer than the expected number of alleles and an analyst may be forced to "simply guess whether all alleles have been detected or not." *Id.* Or a test may show more than the expected number of alleles, possibly reflecting a flaw in the testing process, a misread of the test by the software, or any number of random factors. *Id.*

Errors in DNA testing may result from more than accidental contamination and mislabeling. Many DNA analysts were trained as law enforcement officers, many public labs are closely aligned with police departments,[19] and

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Laboratory and Property Room 5–6 (Jan. 4, 2006), *available at* http://www.hpdlabinvestigation.org/reports/060104report.pdf.

[17] The subjective judgments discussed herein refer to those required to perform an STR test, the test used by the prosecution's expert in this case.

[18] Many of the DNA samples tested in the case at bar were mixed. Record at T4-102–14, T4-155–59.

[19] State crime labs, which were used for DNA testing by 82% of full-time medium state prosecution offices, DeFrances, at 8–9, are "funded with

(*continued next page*)

private labs may receive substantial compensation by the prosecution for their analysis.[20] Analysts may be privy to details of the prosecution's theory of the case and the expected outcome of the test, or consider information outside the realm of scientific knowledge. For instance, one DNA analyst's notes read: "Suspect -- known crip gang member — keeps 'skating' on charges — never serves time. This robbery he gets hit in head with bar stool — left blood trail. [Detective] Miller wants to connect this guy to scene w/ DNA * * *." Moriarty § 11:24 (quotation omitted). Moreover, given the necessarily subjective judgments called for in some cases, DNA analysts may unconsciously tilt their findings to support the prosecution's theory.[21]

In some cases intentional falsification occurs. An analyst may "fak[e] test results to cover up errors arising from cross-contamination of DNA samples and sample mix-ups." Thompson, *Gold Standard*, at 12. Indeed, analysts have been "fired for scientific misconduct, and specifically for falsification of test results," from laboratories operated by the FBI, the Chief Medical Examiner in New York City, the U.S. Army, and private enterprises. *Id.* at 11–12. A DNA analyst in the FBI laboratory failed to use proper controls and falsified laboratory reports (*id.* at 12), "render[ing] over two years worth of her STR work scientifically invalid and

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criminal justice dollars, and often physically located in police buildings." DiFonzo, at 10–11.

[20] See Moriarty § 11:60. The laboratory in this case was paid more than $30,000 by the prosecution. Record at T4-133.

[21] See D. Michael Risinger et al., *The* Daubert/Kumho *Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 Cal. L. Rev. 1, 35–42 (2002).

unsuitable for use in court."[22] A West Virginia State DNA analyst was found to have a "long history of falsifying evidence in criminal prosecutions." *In re Investigation of the W. Va. State Police Crime Lab.*, 438 S.E.2d 501, 503 (W. Va. 1993).

B. An Independent Expert Protects Against Error.

The only meaningful defense against the kind of errors described above is an independent DNA expert. Such experts perform a number of crucial functions in challenging incriminating DNA evidence. To start, a defense expert can independently test a DNA sample. Although DNA tests are rife with uncertainty, it is "implausible that two laboratories would reach the same false results."[23] Accordingly, a second test performed by an independent expert is "[a] wrongly accused person's best insurance against the possibility of being falsely incriminated."[24]

If sufficient DNA samples are not available for retesting, an expert can assist defense counsel in understanding the underlying science and reviewing the prosecution's test data for errors.[25] The complexity of DNA testing is such that it is "difficult if not impossible for a lawyer to evaluate the

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[22] Office of the Inspector Gen., U.S. DOJ, The FBI DNA Laboratory: A Review of Protocol and Practice Vulnerabilities 47 (May 2004), *available at* http://www.usdoj.gov/oig/special/0405/final.pdf.

[23] William C. Thompson, *DNA Evidence in the O.J. Simpson Trial*, 67 U. Colo. L. Rev. 827, 844 (1996).

[24] Nat'l Research Council, Nat'l Acad. of Sciences, The Evaluation of Forensic DNA Evidence 87 (1996).

[25] See John Devlin, *Genetics and Justice: An Indigent Defendant's Right to DNA Expert Assistance*, 1998 U. Chi. Legal F. 395, 406–07 (1998) [hereinafter Devlin].

evidence without expert assistance."[26] An expert's review of the underlying data may reveal improper analysis, contaminated or mislabeled samples, or a failure of test controls. See Moriarty § 11:24. And even if no errors are obviously apparent, "effective cross-examination of a prosecution expert frequently requires the advice of a defense expert."[27]

A defense expert may also provide meaningful information to the jury about the strengths and weaknesses of DNA evidence. Without an understanding of the limitations of DNA tests, jurors may give undue weight to the prosecution's evidence. "DNA analysis and the resulting statistics can be extremely convincing evidence to jurors who have heard hours of expert testimony and statistics regarding the improbability of misidentification or other errors in the procedure." *Dubose* v. *State*, 662 So. 2d 1189, 1196–97 (Ala. 1995) (citation omitted). A defense DNA expert can inform the jury about the inherent limitations in DNA testing, point out potential problems in the gathering or testing of such evidence, and provide jurors with a better understanding of the statistics cited by prosecution experts.[28]

As the court below recognized, access to the prosecution's expert is no substitute for an independent defense expert. Pet. App. 42a–48a. Perhaps most important, access to the

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[26] William C. Thompson et al., *Evaluating Forensic DNA Evidence: Essential Elements of a Competent Defense Review*, 27 Champion 24, 26 (2003) [hereinafter Thompson, *Essential Elements*]; *see also* Nat'l Research Council, Nat'l Acad. of Sciences, DNA Technology in Forensic Science 147 (1992); Moriarty § 11:1.

[27] Paul C. Giannelli, Ake v. Oklahoma*: The Right to Expert Assistance in a Post*-Daubert*, Post-DNA World*, 89 Cornell L. Rev. 1305, 1376 (2004) [hereinafter Giannelli].

[28] See, *e.g.*, Moriarty §§ 11:38, 11:39; Devlin, at 405–08; Thompson, *Essential Elements*, at 27–28.

prosecution's expert does not allow for an independent retest of a DNA sample. Moreover, many prosecution DNA experts whose labs may be closely aligned with law enforcement or who may have significant financial incentives to defend their results may be disinclined to assist the defense.[29] Finally, as this Court has recognized, the "appropriate means of attacking shaky but admissible evidence" include "[v]igorous cross-examination" and "presentation of contrary evidence," *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993), both of which can be done only with the assistance of a defense DNA expert.

Defense use of DNA experts also furthers the societal interest in the accuracy of DNA testing. Widespread access by defendants to DNA experts can help to expose systemic laboratory and analyst errors, and to ensure the validity of DNA evidence used at trial. As one director of a DNA laboratory noted, "[r]esources must be made available" to the defense to analyze DNA evidence because "[i]f you want the best crime lab, you need to have the best criminal defense attorneys to challenge us." Liptak, at 5. Indeed, some of the worst laboratory abuses have occurred in jurisdictions that regularly fail to provide DNA experts to defendants. Thompson, *Gold Standard*, at 11.

II.
Petitioner's Constitutional Right to an Expert Cannot Be Conditioned on Relinquishment of His Constitutional Right to Counsel.

In light of the foregoing, the Maryland Court of Appeals correctly held that the rationale of *Ake* v. *Oklahoma*, 470 U.S. 68, 74 (1985), extends to defense DNA experts because "[d]ue process and equal protection require the State to provide non-psychiatric experts to indigent defendants when

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[29] Moriarty § 11:60; Giannelli, at 1378 & n.482.

the defendant makes a particularized showing of the need for assistance of such experts." Pet. App. 27a. The court erred, however, in holding that the State may condition the exercise of Petitioner's right to expert services on the relinquishment of his Sixth Amendment right to counsel.

The State refused to provide Petitioner with the assistance of a DNA expert in this case not because Petitioner did not qualify as indigent, but because he was not represented by the public defender. Pet. App. 42a.[30] The Maryland Court held that the Constitution permits that result: "While such defendants may face difficult choices, the Constitution does not bar the State of Maryland from requiring them to choose between counsel of their choice and ancillary services provided by the [public defender]." *Id.* at 41a.

That was incorrect. Indigent defendants may not be required to surrender one constitutional right — the Sixth Amendment right to counsel of choice — in order to avail themselves of another — the due process right to present a meaningful defense, here by way of a defense DNA expert. That is the clear teaching of *Simmons* v. *United States*, 390 U.S. 377 (1968), which held that a defendant who wished to challenge an allegedly unconstitutional search could not be required, as a condition of the challenge, to admit ownership of the property in which the incriminating evidence was found. Such a requirement, the Court held, would put a defendant to an unconstitutional choice: "either to give up what he believed * * * to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination." *Id.* at 394. It was "intolerable,"

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[30] Petitioner initially passed the public defender's test for indigency before he acquired the funds needed to retain his counsel. Pet. App. 6.

the Court concluded, that "one constitutional right should have to be surrendered in order to assert another." *Id.*[31]

In departing from that rule, the court below devalued the Sixth Amendment right at stake by mistakenly relying on cases involving ***appointed*** rather than ***retained*** counsel. See Pet. App. 40a (quoting *Fawlkes* v. *State*, 536 A.2d 1149, 1159 (Md. 1988) ("for indigent defendants * * * the right to counsel is but a right to effective legal representation; it is not a right to representation by any particular attorney")). The difference is critical. An indigent defendant for whom counsel is appointed has a limited right to counsel of choice because the State pays for the representation. See *Wheat* v. *United States*, 486 U.S. 153, 159 (1988) (the Sixth Amendment protects "the right to select and be represented by one's preferred attorney" but "a defendant may not insist on representation by an attorney he cannot afford"). By contrast, a defendant like Petitioner, indigent or not, who ***retains*** his own counsel has a virtually absolute right to counsel of his choosing. See *United States* v. *Gonzalez-Lopez*, No. 05-352, slip op. at 3–4, 9 (U.S. June 26, 2006) (deprivation of right to counsel of choice constitutes "structural error"); *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 624–25 (1989) ("[T]he Sixth Amendment guarantees a defendant the right to be

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[31] *Accord United States ex rel. Wilcox* v. *Johnson*, 555 F.2d 115, 120 (3d Cir. 1977) (when defendant's due process right to testify requires him to give up his Sixth Amendment right to counsel, "both rights are corrupted"); *United States* v. *Scott*, 909 F.2d 488, 493 (11th Cir. 1990) (trial judge "impermissibly forced defendant to choose between two constitutional rights: the right to testify and the right to counsel"); *United States* v. *Herrera-Ochoa*, 245 F.3d 495, 499–500 (5th Cir. 2001) (using physical presence at trial to establish immigration violation impermissibly pitted defendant's "Sixth Amendment right to be present at trial [against] his Fifth Amendment due process right that the government prove each and every element of the offense * * * beyond a reasonable doubt").

represented by an otherwise qualified attorney whom [the] defendant can afford to hire, or who is willing to represent the defendant even though he is without funds.").[32]

These holdings reflect the fundamental importance of the right to counsel of one's choice. Choosing counsel may well be the most important decision a defendant makes in shaping his defense. "Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument." See *Gonzalez-Lopez*, slip op. at 9. The defendant's choice "will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial." *Id.* Moreover, choosing one's own counsel fosters the trust between attorney and client that is necessary for the attorney to be a truly effective advocate. See ABA Standards for Criminal Justice § 4-3.1 cmt. at 4-29 (2d ed. 1980). Honoring that choice shows the "'respect for the individual which is the lifeblood of the law.'" *Faretta* v. *California*, 422 U.S. 806, 834 (1975) (quoting *Illinois* v. *Allen*, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring)).

The court below thus erred in relying on language in *Ake* cautioning that an indigent defendant's right to a state-funded psychiatric expert does not translate to a "'constitutional right to choose a psychiatrist of his personal liking.'" Pet. App. 37a (quoting *Ake*, 470 U.S. at 83). Petitioner is not claiming that the State must provide him with a DNA expert of his "personal liking." But the State must provide him with expert

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[32] There are exceptions when the integrity of the judicial process is threatened, but none applies here. See, *e.g.*, *United States* v. *Mullen*, 32 F.3d 891, 897 (4th Cir. 1994) (choice can be overriden when it is "manipulated to delay proceedings or hamper the prosecution" (quotation omitted)).

DNA assistance of some sort — as the court below properly held — and it may not deny him that right simply because he refuses to forfeit his fundamental right to retained counsel of choice. The State may no more condition the exercise of Petitioner's *Ake* right on abandoning his retained counsel than it could on relinquishing his right to a jury trial.

The decision below is incorrect not only under *Simmons* but also under a straightforward equal protection analysis. By treating differently indigent defendants who are represented by retained counsel from those who are represented by the public defender, and providing necessary expert assistance to the latter but not the former, the State has impinged on the fundamental constitutional right to counsel. See *Gonzalez-Lopez*, slip op. at 7 (right to choose counsel is "the root meaning of the [Sixth Amendment's] constitutional guarantee"). That different treatment may be justified only if it is necessary to promote a compelling governmental interest. *E.g.*, *Ill. Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 185 (1979); *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969). But the State has advanced no compelling governmental interest that could justify the burden imposed on Petitioner's right to counsel of choice.

Indeed, the decision below advances virtually no rationale for conditioning the right to expert assistance on the forfeiture of the right to retained counsel of choice. Nor is any rationale readily apparent. If the State is worried about protecting its fisc while still permitting eligible defendants access to expert assistance, it could establish expert fee schedules and limits, cap the amount of fees, or require pre-approval of fees.[33] Or the State could put competent experts on retainer and make

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[33] Concern for the public fisc is hardly a compelling governmental interest here because every defendant allowed modest fees for expert services saves the State the greater expense of appointed counsel. See, *e.g.*, *State* v. *Handson*, 689 A.2d 1081, 1083–84 (Vt. 1996).

them available to indigent defendants regardless of the status of their counsel. And "guaranteeing expert assistance to indigent criminal defendants represented by private counsel * * * poses little risk of abuse because evaluation of the necessity of requested expert assistance to an adequate defense would remain within the discretion of the trial judge." *State* v. *Punsalen*, No. 77490-1, slip op. at 4 (Wash. Sup. Ct., May 4, 2006).

In short, there is no justification — let alone one weighty enough to override the Sixth Amendment right to retained counsel of choice — for a state policy that requires defendants to relinquish their right to retained counsel of choice in order to exercise their *Ake* right to necessary expert assistance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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